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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1975

No. 74-1304

STATE OF NEVADA, ex. rel. ROLAND D. WESTERGARD
State Engineer, *Petitioner*

VS.

UNITED STATES OF AMERICA, *Respondent*

No. 74-1107

FRANCIS LEO CAPPAERT, MARILYN I. CAPPAERT, et al.,
Petitioners

VS.

UNITED STATES OF AMERICA, *Respondent*

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONERS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE

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BRIEF OF AMICI CURIAE

I. INTEREST OF AMICI

The Western States named herein as *amici curiae* all have systems for the administration and the determination of water rights. Due in significant part to the security afforded by water rights granted under

these systems, the West has been transformed into an economically productive and socially inhabitable region. R. J. Moses, Federal-State Water Problems, 47 *Denver L. J.* 194 (1970). As the Public Land Law Review Commission stated in its report published in 1970:

> "In nearly one hundred years of development, state water law has achieved a reasonable certainty of results which has permitted substantial public and private development in the west. While sometimes necessarily complex, the state administrative and judicial procedures have provided a means to determine security of rights to the use of water." Public Land Law Review Commission, *One Third of the Nation's Land* 142 (1970).

However, unquantified and indefinite federal claims to unappropriated water for use on federal reservations under the so-called "implied reservation doctrine," have served to becloud the status of state created water rights so that the continued orderly planning and development of western resources is threatened.

The reservation doctrine is based on the premise that the Western States did not acquire title to the public lands when they were admitted to the Union and, therefore, as to lands which have not been disposed of by the United States, the federal government is still the owner. Therefore, the federal government claims a right to dispose and regulate the use of the retained public domain lands and waters

pursuant to the Property Clause of the Constitution. U. S. Const. Art. IV § 3(2). In exercising this power, the government may dispose of the land and water together or the land and water separately. The federal government did not dispose of its ownership rights to such waters by the Act of July 26, 1866, 14 Stat. 253, 43 U.S.C. 661 (1938), the Act of July 9, 1870, 16 Stat. 217, 43 U.S.C. 661 (1938), or the Desert Land Act of March 3, 1877, 19 Stat. 377, 43 U.S.C. 321, 323 (1958), but merely chose to thereby defer control over the western waters to the states. If the United States withdraws a portion of the public lands for a federal purpose and if at the same time the government intends to reserve unappropriated water for that purpose, then the states' authority to control this water is revoked. In the words of one leading authority in explaining the doctrine:

> "An appropriator complying with state law cannot obtain title to it and his right applies only to the surplus water, if any, remaining after the federal right is satisfied. The reserved water so withheld is the property of the United States, and the government exercising its proprietary powers and rights can put it to use without complying with state law. The block of water that will ultimately be needed on the reserved lands may be used in the meantime by an appropriator who complies with state law, but if that water is later put to use by the government, it takes no property from the temporary user and owes him no compensation." F. J. Trelease, *Federal-State*

Relations in Water Law 114 (1973).

Thus the doctrine poses the threat that new federal uses will be given turn-of-the-century priorities that can take water from currently valuable uses established pursuant to state law without paying any compensation. The concern with which the *amici* as Western States view this threat is obvious by the fact that as a result of federal reservations and withdrawals from those lands open to public settlement, as of June 30, 1963, approximately 40% of the total acreage within those states (with the exception of North and South Dakota) included in the Desert Land Act is under the responsibility of federal agencies: a total of 360,789,045 acres in the 11 contiguous Western States. Note, *Western Water and the Reservation Theory — The Need For a Water Rights Settlement Act*, 26 Mont. L. Rev. 204-5 (1965). Approximately 61% of the total surface water runoff is derived from federally reserved lands. Public Land Law Review Commission, *One-Third of the Nation's Land* 141 (1970). It should be thus apparent that the uncertainties generated by the doctrine with respect to state granted water rights have adversely affected water resources planning and development. As the National Water Commission concluded in 1973:

> "...the reservation doctrine frustrates sound planning in the public and private sectors of the economy. The prospective claims of the government are highly uncertain as to time, manner and quantity of use. Consequently, no planner or investor can establish a meaningful water budget. It is impossible to prove how many non-federal projects were not undertaken because of these uncertainties, but statements to the Commission reveal profound concern on the part of state officials." National Water Commission, *Water Policies for the Future* 467 (1973).

The concern of state officials over the potential implications of the reservation doctrine has further increased in recent years due to the national thrust to be more energy self-sufficient. Already in the energy producing western states, competition for available water supplies is intense. The farmer and rancher must compete not only with industry, but now, if the lower court's decision is affirmed, with the federal government as well. Moreover, it takes no great imagination to anticipate that federal reservations of water, under the broad construction of the doctrine proposed by government attorneys, will one day be asserted to extend to federal mineral reservations in those states where state and federal policy may not conform. If the government's claims were upheld, the effect upon the administration and the economy of the states where there is extensive federal mineral ownership would be disastrous. The following excerpt from Part I of the section entitled "Legal Parameters" of the "Report on Water for Energy in the Northern Great Plains Area," completed in January of 1975 by the Department of Interior Water and Energy Management Team (GPO 857-510), gives some credence to the apprehension of the western states:

> "As with other areas of the country, energy development in Northern Great Plains is dependent

upon the availability of and the legal right to utilize water. Water is essential to all phases of energy development from mining and revegetation of mined lands to actual energy production, gasification or other uses. Historically, developers of energy and other mineral resources have provided their own water supplies for this purpose. The Government, in the past, has not sought to supply water rights to mineral or other energy resource lessees, claimants, permittees, etc. Accordingly, it is anticipated that non-Federal entities obtaining leases, permits or other rights to develop Federal energy resources must obtain the water necessary for development of such resources under State procedures. Exceptions to this will be instances where Federal water projects have water available for marketing for energy resource development purposes . . . or cases where other Federal rights are involved."

That such statements evoke deep concern on the part of state officials is due in part to the uncertain parameters of the doctrine in the case law. There have been relatively few cases dealing with the doctrine and many issues concerning the scope of the doctrine remain unresolved. Thus, according to the exhaustive legal study prepared for the Public Land Law Review Commission, the following issues, among other, remain undecided:

> "(1) the detailed nature of the showing required to establish an implied intent to reserve waters upon the creation of a reservation.

> (2) The nature and scope of the permissible purposes for the use of water that may be deemed to be within the implied intent on establishment of the reservation;" C. Wheatley & C. Corker, *Study of the Development, Management, and Use of Water Resources on the Public Lands* 136 (1969).

To the study's list should be added the question of whether the reservation doctrine applies to groundwater as well as surface water, and if so does the reservation doctrine apply only to groundwater under the reserved lands or does it encompass groundwater under adjoining lands. Note, *Federally Reserved Rights to Underground Water — A Rising Question in the Arid West*, 1973 Utah L. Rev. 43-54.

No cases have been decided since the publication of the Public Land Law Review Commission study in 1969 which dealt with the above questions. However, each of the above issues is involved in the Ninth Circuit's decision. Despite expressed Congressional intentions and prior executive branch determinations to the contrary, the Ninth Circuit concluded that Congress impliedly intended to vest the President with the authority to reserve water as distinct from land under the Act for the Preservation of American Antiquities (Act of June 8, 1906, Ch. 3060, 34 Stat. 225, now 16 U.S.C. § § 431-433) and furthermore, that one of the permissible purposes for the use of water for withdrawals under this Act is the preservation of an endangered species of desert pupfish. The court also held that the reservation doctrine applies to ground-

water and that the President intended to reserve sufficient groundwater in Devil's Hole to preserve the pupfish. Therefore, the government was entitled to enjoin an adjacent landowner from pumping water underneath his land pursuant to subsequently granted state well permits to the extent that such pumping lowered the level of the water in the Hole and thus jeopardized the pupfish. Finally, the court in essence allowed the federal government to ignore with impunity determinations as to its reserved rights claims made in a state administrative proceeding in which it participated and from which it failed to appeal.

By thus resolving the above issues in favor of the government, the Ninth Circuit court would significantly expand the extent to which the reservation doctrine may be used to preempt state control over water resources. The *amici* thus feel compelled to advise this Court of their position in opposition to the Ninth Circuit decision.

II. QUESTION PRESENTED

This brief is confined to the following issues which the *amici* consider to be the most crucial to their interests:

(1) Whether Congress intended under the Act for the Preservation of American Antiquities to vest the President with authoriy to reserve water for the purpose of protecting an endangered species.

(2) Whether the federal government can invoke the "reservation doctrine" to assert superior rights to groundwater so as to enjoin a landowner, adjacent

to the federal lands, from pumping water from beneath his land pursuant to state granted well permits.

(3) Whether the federal government should be barred under the principles of *res judicata* from seeking to adjudicate in a subsequent judicial action issues decided in an administrative proceeding in which it participated to determine a water rights application before the State Engineer from whose order the government failed to appeal.

III. SUMMARY OF ARGUMENT

The application of the reservation doctrine is dependent on the assumption that the government intended to reserve unappropriated water for the reserved land. With respect to non-Indian lands, if this intention is not expressed in the legislation authorizing the withdrawals, or if it is not clearly implied from the authorizing legislation, then the government should not be deemed to have reserved rights. The government rests its reserved rights claims on a proclamation issued by President Truman in 1952 pursuant to the Act for the Preservation of American Antiquities. The text of this Act, its legislative history, and subsequent administrative interpretation, make it clear that that executive had no express or implied authority under the Act to reserve water for the purpose of protecting an endangered species. Therefore, even assuming, arguendo, that President Truman intended to do so, he had no authority under the Act upon which he relied to withdraw water for the preservation of desert pupfish.

There is no firm precedent for the lower court's holding that the reservation doctrine applies to ground-

water so that the government is entitled to enjoin landowners adjacent to the reservation from pumping water underneath their lands pursuant to state granted well permits. Furthermore, the rationale behind the doctrine —the implied intent of the government to reserve water for use on reserved lands—is not applicable in the case of groundwaters whose existence and flow could not have been known at the time of the federal withdrawal of lands from the public domain. Furthermore, so applying the doctrine would significantly impair the efforts of the western states under their groundwater statutes to control the use of groundwater and afford security in its use through state granted permits.

The *Winters* doctrine, arising as it did in a case involving the special trust obligation of the United States to the Indian tribes, when applied to non-Indian reservations is an unwarranted extension of the doctrine and has become productive of extreme confusion in the water law. There is no viable reason why the water rights of such reservations should not stand or fall based upon an equality of right with other users of water. The Federal government is not such a privileged user that it may be excused from compliance with traditional water law concepts. It may exercise its power of condemnation to realize needs not available to it by a fair application of such law. Yet, the result of the lower court's decision in this case permitted the Federal government to pick and choose among favorable elements of prior appropriation doctrine and riparian rights and thereby avoid the equitable burdens placed upon those doctrines by the Western States in

order to assure an equitable sharing of their limited water resources. In the instant case, the government claimed and was granted a priority under prior appropriation doctrine; in another case, it might claim a future use, a riparian concept. It may deny that its reserved right is affected by non-use or inefficient use, or that it is subject to an equitable sharing when insufficient water is available to meet the needs of the reservation. There is no limit to the inconsistent claims which the government may be expected to add to their shopping list as the occasion arises. The result of this hybrid contrivance is to emasculate the salutary principles of Western States water law in contravention of the intent of Congress and public policy.

The United States participated in an earlier state proceeding to determine the individual defendant's application for a well permit to the extent that it should have been barred under the principles of *res judicata* from adjudicating issues in the lower federal court which were decided in the state proceeding. Holding otherwise, as did the Ninth Circuit, allows the government to have a second independent review of its reserved rights claims in disregard of prior determinations under state laws and procedures and contrary to the guidelines set forth by this Court in the *Eagle County* case.

Despite government contentions to the contrary, this case does not involve the survival of the Devil's Hole pupfish. The government has ample alternative means to protect the pupfish without relying on the reservation doctrine to enjoin, without payment of compensation,

adjacent landowners from using their state granted rights.

IV. ARGUMENT

A. ASSUMING, ARGUENDO, THAT HE INTENDED TO DO SO, PRESIDENT TRUMAN DID NOT HAVE AUTHORITY UNDER THE ACT FOR THE PRESERVATION OF AMERICAN ANTIQUITIES TO RESERVE WATERS ON LANDS WITHDRAWN PURSUANT TO THE ACT FOR THE PURPOSE OF PROTECTING AN ENDANGERED SPECIES OF DESERT PUPFISH.

As previously noted, the question of the showing required to establish an implied intent to reserve waters upon the creation of a reservation has not been decided. Nevertheless, government attorneys have consistently advanced a very broad construction of the doctrine's scope to the effect that reservation of all of the unappropriated waters which are appurtenant to the lands is created automatically as a matter of law concomitant with the withdrawal of lands. *E.g.*, Record at 12,440-41, 12,444, *Arizona v. California*, 376 U.S. 340 (1964). Counsel for the United States in its brief before the lower court also advanced this proposition in the following language:

> "In all cases, the test to be applied to determine the existence of federal reserved water rights is whether the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created."

Thus it is suggested that the mere act of withdrawal automatically results in the reservation of unappropriated waters for the purposes of the reservation.

The effect of this broad construction of the doctrine can be demonstrated by applying it to the general executive withdrawal orders of 1934-35, where-

under all of the vacant, unappropriated public lands of the United States were withdrawn for the purposes of classification under Section 7 of the Taylor Grazing Act, act of June 18, 1934, ch. 865, 48 Stat. 1269, 43 U.S.C. 315 (1964). Exec. Order No. 6190, Nov. 26, 1934, 54 I.D. 539 (1934); Exec. Order No. 6964, Feb. 5, 1935, 55 I.D. 188 (1935). If the government's proposition were accepted, then subsequent to the issuance of these orders, all of the unappropriated waters on the public lands of the country became thereby subject to a federal claim for the purpose of administering the Taylor Grazing Act. Examination of the rationale behind the reservation doctrine and careful analysis of the statutory authority for the 1934 and 1935 executive withdrawals discloses, however, that these withdrawals did not involve the implied reservation doctrine for waters contained thereon.

The application of the reservation doctrine is dependent on the assumption that the government intended to reserve unappropriated water for the reserved land. Thus, in the landmark case of *Winters v. United States*, 207 U.S. 564 (1908), this Court ruled that Congress must have intended to reserve rights to water for lands that it set aside by treaty for an Indian reservation, even though it did not expressly provide for them. This intention to reserve water was implied on the basis that it would be unconscionable for the United States to have induced Indians onto a reservation, where they were to settle and develop an agricultural economy with-

out supplying them an adequate supply of water for agricultural and related purposes. However, the special circumstances that may justify an implication of intent to reserve water for the Indians—treaties attempting to convert the Indians from a nomadic to a pastoral life, the doctrine that agreements with Indians are to be construed in favor of the Indians, and the fear that the Indians could not compete with the more advanced non-Indians in acquiring the water and putting it to beneficial use — are not present with respect to other federal establishments. Note, *Water in the Woods: The Reserved Rights Doctrine and National Forest Lands*, 20 Stan. L. Rev. 1187, 1188 (1968). A significantly greater showing of an intention to reserve waters for non-Indian lands as opposed to Indian lands should therefore be required. If this intention is not expressed in the legislation or order authorizing the withdrawal, or if it is not clearly implied from the authorization, then the government should not be deemed to have reserved rights.

Under the above test, it is clear that the general executive withdrawals of 1934 and 1935 pursuant to the Taylor Grazing Act of 1934, supra, are not entitled to reserve water rights. The 1934 withdrawal, which embraced all of the Western States, declared that it was "necessary to classify all of the vacant, unreserved and unappropriated lands of the public domain . . . for the purpose of effective administration of the provisions of [The Taylor Grazing Act of 1934]." Exec. Order No. 6190, Nov. 26, 1934, 54 I.D. 539 (1934). Nothing in the withdrawal order directly

refers to any intention to reserve water on the public domain. Nevertheless, such an intent could conceivably be implied from the reference to the purposes of the Taylor Act "for conservation and development of natural resources." C. Wheatley & C. Corker, *Study of the Development, Management, and Use of Water Resources on the Public Lands* 243 (1969). However, the Taylor Act clearly disclaims any authority thereunder to impair state water rights. Thus, it states:

> "Provided further, that nothing in this chapter shall be construed or administered in any way to diminish or impair any right to the possession and use of water for mining, agriculture, manufacture, or other purposes which have heretofore vested or accrued under existing law validly affecting public lands or which may hereafter be initiated and maintained in accordance with such law. . . ." 43 U.S.C. § 315 b (1964).

In view of this disclaimer, it cannot be reasonably argued that the President was entitled to reserve water rights in connection with the lands withdrawn in 1934 and 1935 to administer the Taylor Grazing Act.

Such an analysis of the statutory authority for each withdrawal must be made in order to determine the government's reserved rights claims. It is the position of the *amici* that such an examination of the Act for the Preservation of American Antiquities under which President Truman withdrew the 40 acre tract of land containing Devil's Hole, and the Act's statu-

tory background and subsequent executive interpretation clearly discloses that the President also had no authority to reserve waters thereunder for the purpose of protecting an endangered species of desert pupfish, and that the lower court erred in concluding otherwise.

The Act for the Preservation of American Antiquities passed in 1906 vested the President of the United States with authority to "declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest . . ." and to reserve parcels of land as national monuments "the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected." 34 Stat. 225, 16 U.S.C. § § 431-33. There is no evidence whatsoever in the language of the Act to intimate that the President was vested with authority to reserve water as distinct from "parcels of land." Thus, both executive proclamations establishing the Death Valley National Monument prior to 1952 reserved only "certain lands" for the Monument pursuant to the Act. Proc. No. 2028, Feb. 11, 1933, 47 Stat. 2554; Proc. No. 2228, Mar. 26, 1937, 50 Stat. 1823.

Furthermore, the purpose of the Act was to preserve American antiquities of historic and scientific interest. There is absolutely no indication that the Congress intended to vest the executive with authority to make reservations under the Act for the purpose of conservation of wildlife. Indeed, the House Report on the 1906 Act negates any notion of such an intention. It provides

that "[t]he bill proposes to create small reservations reserving *only so much land* as may be absolutely necessary for the preservation of those interesting relics of prehistoric times." (Emphasis added). H. R. Rep. No. 2224, 59th Cong., 1st Sess.

The Ninth Circuit accepted the government's argument that Section 1 of the National Park Service Act of 1916 supports the conclusion that a fundamental purpose of national monuments is to preserve wildlife. The National Park Service Act established the National Park Service to promote and regulate the use of national parks and monuments "by such means and measures as conform to the fundamental purpose of said parks, monuments and reservations, which purpose is to conserve the scenery and the natural and historic objects and wildlife therein and to provide for the enjoyment of the same by such manner and such means as will leave them unimpraired for the enjoyment of future generations." 39 Stat. 535, 16 U.S.C. § 1.

It is submitted that this language is of little or no relevance in determining the purposes of the 1906 Act in question. It is a general provision establishing a new agency with duties that would include the operation of national parks, national monuments, and national historic areas, each having a distinct public purpose warranting protection. The language set forth above was merely a summary of these separate purposes. Moreover, whatever the purposes of national monuments, there is no evidence in the National Parks Service Act to support the government's con-

tention as to the basic issue in this case; whether the President was authorized under the Act for the Preservation of American Antiquities to reserve water as distinct from land for the purpose of protecting an endangered species. Indeed, in addition to the legislative history of the Act for the Preservation of American Antiquities set forth above, the history of the National Parks Services' administration of the national monuments, subsequent Congressional appropriations for the National Parks Service, and finally, a Solicitor General's opinion, make apparent that the President had no such authority.

The National Parks Service, which has jurisdicition over Death Valley National Monument and therefore Devil's Hole, has for some time followed the policy that the Parks Service should adhere religiously to state law with respect to the establishment and maintenance of water rights for use on lands under their jurisdiction. C. Wheatley & C. Corker, *Study of the Development, Management, and Use of Water Resources on the Public Lands* 310 (1969). Thus, the following statements were contained in a proposed chapter for a Parks Service handbook:

> "It is particularly important [for Superintendents] to check with the State Engineer, State Water Board or other proper state authority to determine whether a license or permit is required before a well is started." National Park Service, Resources Management Handbook, proposed Ch. 8, § 3 at 4 (Sept. 1967).
>
> "Where other [water] rights are senior, Superintendents must always respect the prior rights. The need for following these practices arises in connection with the use of water to fill water holes and troughs for wildlife and to store water for domestic and other purposes. It is also good policy to always take water during hours, days, or other periods of comparative plenty. Adherence to this policy often promotes good will and cooperation and can avoid embarrassment in situations in which the Parks' rights are junior to other rights outside the boundaries of the Parks." *Id.* § 3 at 5.

Not only does the proposed chapter on water rights for the Park Services handbook emphasize the importance of compliance with state law, but more importantly no reference is ever made to the reservation doctrine and its potential effect upon water rights acquired under state law. C. Wheatley & C. Corker, *Study of the Development, Management, and Use of Water Resources on the Public Lands* 311 (1969).

Language of a Congressional act of 1946 also clearly demonstrates that Congress as well contemplated that water rights on Park Service lands were to be acquired by the Service pursuant to state law. It provides as follows:

> Appropriations for the National Parks Service are authorized for—
>
> . . . .
>
> *(G) Investigation and establishment of water rights in accordance with local custom, laws, and decisions of courts.* Including the acquisition of

> water rights or of lands or of interests in lands or rights-of-way for use and protection of water rights necessary or beneficial in the administration and public use of national parks and monuments. Act of Aug. 7, 1946, Ch. 788, 60 Stat. 885 (emphasis added).

Note that there is no mention, or even inference, in the statutory provision that acquiring water rights pursuant to state law was being done as a matter of comity on the theory that the withdrawal of the lands reserved all water rights not then validly appropriated.

But there is even more telling evidence that Congress did not intend by either the Act for the Preservation of American Antiquities or the National Parks Service Act to vest the executive with power to reserve water on or adjacent to national monument lands for the purpose of preserving aquatic life. In an opinion issued subsequent to both Acts, the Solicitor General for the Department of the Interior responded to the question of whether there was legal authority for granting a request of the State of Arizona for permission to construct and operate a fish hatchery in the Papago Suguaro National Monument for the purpose of restocking streams and lakes located within the state. *Use of National Monument Lands for Fish Hatchery Purposes*, 51 I.D. 497 (1926). After citing the National Parks Service Act, and noting the arid nature of the National Monument, the Solicitor concluded that "it could not be contended that the primary purpose of a hatchery so located would be to subserve, maintain,

or develop the reservation in harmony with the purpose for which it was established. . . ." At the same time, the court distinguished an arrangement with the State of California whereby the state was permitted to install a fish hatchery in the Yosemite *National Park*, noting that it was in line with the purposes of that reservation. It is also instructive to note that, although the opinion dealt with Papago Saguaro National Monument, it was entitled "Use of National Monument Lands for Fish-Hatchery Purposes." Moreover, the extremely arid nature of Death Valley National Monument is well known. Surely under the reasoning of the Solicitor's opinion, therefore, it also cannot be contended that the addition of 40 acres of land and sufficient groundwater to preserve an endangered species of desert pupfish is in harmony with the purposes for which Death Valley National Monument was established pursuant to the Act for the Preservation of American Antiquities.

In conclusion, assuming, *arguendo*, that the President intended by the Presidential Proclamation of 1952 to reserve water as well as land for the preservation of an endangered species of pupfish, it is clear that he had no authority to do so under the Act for the Preservation of American Antiquities upon which he relied, or any subsequent Congressional act or authorization. The lower court's erroneous conclusion to the contrary presents not only an ominous threat to state granted water rights in waters on or adjacent to the vast national monuments in the West, but also to waters on or adjacent to other reservations

where it is likewise evident that Congress did not intend to reserve water for reservation purposes as distinct from land. The *amici* therefore urge this Court to reverse the Ninth Circuit's decision.

B. THE RESERVATION DOCTRINE SHOULD NOT BE EXTENDED TO APPLY TO PERCOLATING GROUNDWATER SO THAT THE GOVERNMENT IS ENTITLED TO ENJOIN AN ADJACENT LANDOWNER FROM PUMPING WATER FROM BENEATH HIS LAND PURSUANT TO STATE GRANTED RIGHTS.

Despite suggestions in the lower court's opinion to the contrary, neither of the two cases that have dealt with the reservation doctrine in deciding groundwater rights constitute firm precedent for the lower court's holding. The first case was *State ex rel. Shamberger v. United States*, 165 F.Supp. 600 (D. Nev. 1958), aff'd on other grounds, 279 F.2d 699 (9th Cir. 1960), in which the Nevada Federal District Court held that the federal government could use underground waters located under a Naval Depot without obtaining a permit from the state. The court relied on this Court's decision in *Federal Power Commission v. Oregon*, 349 U.S. 435 (1955), in reasoning that since the United States possessed both ownership and control of the land within the scope of its delegated functions under the War Power, it enjoyed a superior position under the Supremacy Clause and state laws need not be observed. However, the significance of *Shamberger* in regard to the present case is, at best, very limited. In the first place the court was not dealing with federal

claims to reserved groundwater rights as against private uses adjacent to the reserved property. Secondly, the Ninth Circuit Court on appeal directed that the case be dismissed because the District Court was without jurisdiction. Under such circumstances, the holding in *Shamberger* does not rise to the level of obiter dictum and thus has no value as a precedent applicable in deciding the issues in the instant case.

The case of *Tweedy v. Texas Company*, 286 F.Supp. 383 (D. Mont. 1968), also referred to the reservation doctrine with respect to percolating water. The owners of land within an Indian reservation brought an action for damages against the holder of an oil and gas lease for all groundwater drawn by the lessees and used in the extraction of oil. The plaintiff claimed that he had rights to the groundwater as an incident of ownership of land. The court noted that the reservation of waters for the Indian lands would apply both to surface or underground water. This statement, however, was completely gratuitous in view of the court's decision against the plaintiff on the basis that it had failed to show any damage caused by the defendant's use. Furthermore, the issue of whether the owner of federal reserved water rights may prevent the use of water by adjacent private parties in order to protect its own underground water supply was also not before the court in *Tweedy*. Thus, the language in *Shamberger* and the dictum in *Tweedy* were in no way dispositive of the issues before the Ninth Circuit in the present case. Moreover, the rationale for the reservation doctrine—the implied

intent of Congress to provide water for the purposes of the reservation—does not support an extension of the doctrine to percolating groundwaters.

Surface water flowing through or by reserved lands should have been apparent to Congress at the time of the withdrawal; thus, it can be reasonably asserted under the proper circumstances that Congress had "impliedly" reserved the surface water for use on reserved lands. In the case of groundwater however, the existence, extent, and flow of groundwaters underneath reserved lands could not have been apparent to Congress, and it is therefore unreasonable to impute to Congress an intent to reserve such waters. Note, *Federally Reserved Rights to Underground Water—A Rising Question in the Arid West*, 1973 Utah L. Rev. 43.

There is also another fundamental difference between surface and percolating waters. Since surface water moves rapidly over a stream bed, an upstream diversion can affect the downstream user within a matter of hours. Percolating water, on the other hand, moves very gradually through no defined channel and because of false non-porous materials and other natural factors, it is often impossible to predict the effect of the drawing of groundwaters on other water supplies. Thus, a groundwater user adjacent to a reservation can pump water for years before the total effect is known. By that time, he could have made a substantial investment in the land and water use. Under such circumstances, application of the reservation doctrine with its no compensation feature

would be unconscionable. *Id.*

Groundwater is a significant resource in the United States. In 1963 one fifth of the nation's water needs were met from underground sources and this proportion is projected to reach one half in the near future. Comment, *Appropriation and Colorado's Groundwater: A Continuing Dilemma*, U. Col. L. Rev. 133, 134-35 (1967). It is not known to what extent groundwater supplies are derived from federally reserved lands. However, the amount will probably parallel surface water in percentages. Note, *Federally Reserved Rights to Underground Water—A Rising Question in the Arid West*, 1973 Utah L. Rev. 43, 46. Realizing the importance of this resource, most Western States have enacted comprehensive statutes governing groundwater use. Applying the reservation doctrine as did the Ninth Circuit precludes state control under these statutes over the use of underground water under both the reserved land and adjacent non-reserved land to the extent deemed necessary to fulfill the purposes of the reservation. Moreover, since it is nearly impossible to predict the extent and flow of groundwaters, state administrators, as a result of such a decision, could well become reluctant to issue any permits for the drilling of wells in the general vicinity of reserved lands in anticipation that the government could at some point in the future successfully assert a right to the same groundwater. In view of the percentage of western lands in federal ownership such a result would significantly impair the efforts of the Western States under their ground-

water statutes to control the use of groundwater and to afford security in its use through state granted permits.

Even if the reservation doctrine should be held applicable to ground water, such an extension does not justify an application of the doctrine so that the United States may dominate the entire acquifer in a monopolistic manner. The *amici* suggest that the present injunction issued forth from a confused state of the law concerning the reservation doctrine and its relationships with traditional Western States water law.

Controversies represented by the instant case are inevitable. When they arise between private parties, the party in the present position of the United States has often been accorded the right of an owner of land overlying ground water, under whatever water doctrine prevails in the jurisdiction in question. II Hutchins, *Water Rights in the Nineteen Western States* 595 (1974). If *Federal Power Commission v. Oregon*, supra, 349 U.S. 435 teaches that state water laws do not apply to reservations, then when the United States is a party to the controversy as in the instant case, the resolution of issues involving the reservation is complicated by the fact that there is no federal water law. See *United States v. Hennen*, 300 F. Supp. 256, 260 (D.Nev. 1968). "There is no body of Federal common law separate and distinct from the common law existing in the several states . . . For after all, the common law is but the accumulated expressions of the various judicial tribunals in their efforts to ascertain what is right and just between individuals in respect to private disputes."

Kansas v. Colorado, 206 U.S. 46, 96, 97 (1907). There is a rich background of common law which has developed and expounded the policies and doctrines suitable to the determination of water rights in the arid and semiarid Western States. Recognition of each Western State's substantial interest in its own system of state water rights requires that the reservation doctrine be amenable to State policies and doctrines.

With regard to the proper law of the case, the contention is supportable that the common law of riparian rights could have governed the instant controversy even though the State of Nevada follows the doctrine of prior appropriation. The instant case provides an interesting analogy to *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973) wherein riparian principles were held applicable. In *Bonelli* a federal rechannelization project affected Arizona's title to land; here a federal reservation affected Nevada's title to water. This Court applied federal law in *Bonelli* to establish the extent of State ownership in the bed of a navigable river under the Submerged Lands Act and equal footing doctrine; it applied State law to determine whether there had been any divestment of the State's interest; and it applied the federal common law riparian principles of accretion, reliction and avulsion to resolve the question of ownership of the bed when the course of the river had changed. Similarly, federal law, state law and federal common law may appropriately apply to various aspects of the instant case. The State's jurisdiction over water on public lands was construed in *California Power Co. v. Beaver Cement Co.*, 295 U.S. 142, 163-64

(1935) wherein this Court held that:

> "following the act of 1877, if not before, all non-navigable waters then part of the public domain became *publici juris*, subject to the plenary control of the designated states, including those since created out of the territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common law rule in respect of riparian rights should obtain."

Thus, the States' grant of power by Congressional legislation is determined by federal law, but as in *Bonelli* state law thereafter determines the extent of rights granted in the public waters under the applicable state selected scheme of prior appropriation or riparian rights. It is of special interest to note that the Court in the *California Power Co. Case* recognized that Congress had vested the power in the states to affect the riparian rights of the United States as to non-navigable waters which were a part of the public domain, but the *Federal Power Commission* case, supra, held without persuasive discussion that such power did not extend to Federal reservations. 349 U.S. at 448. With respect to reservations created after 1877, the objectionable conclusion that what Congress has given Congress may take away may be mollified only by recognizing the grant of substantial powers to the Western States under the acts of 1866 and 1870 and the Desert Land Act of 1877 and by reconciling the effects of subsequent reservations with the States' substantial interests in their established systems of water rights determination and administration. If the Federal government is not bound

by the States' laws, then it is reasonable to assume that the federal common law of riparian rights remains intact as a substructure to adjust competing interests involving the reservation. If so, then it should be applied with the proviso as recognized in *Bonelli* at 323-24 that the federal common law be supplemented by requiring an appraisal of the State's interests which may be affected. See also the Special Master's Report at 22 in *Utah v. United States* 420 U.S. 304 (1975). The paramount interest of the States in this regard is the protection of private water rights granted pursuant to procedures authorized by Congress as against competing rights arising from a subsequent reservation by the United States, and in every case where a "legitimate claim of entitlement" arises under a state granted water right, the reliance on that right should not be arbitrarily undermined by the government's subsequent claim of an implied right under the reservation doctrine. *Amici* suggest therefore, by the analogy to *Bonelli* that with respect to federal reservations on western lands, at least, that if the applicable water law more appropriately is the federal common law of riparian rights as modified by the special circumstances and necessities of the Western States, then the injunction was improper under the circumstances of the instant case.

The application of the common law of riparian rights to the instant case is supported by other considerations. According to Samuel C. Wiel, author of a well-known treatise on Western States water law, the *Winters* doctrine water rights incident to a Federal reservation are similar to those of a riparian propri-

etor. 1 Wiel, *Water Rights in the Western States*, § 207 (3 ed. 1911). He concludes that:

> ". . . [I]f the proprietary rights of the United States are recognized *beyond actual use*, it can only be because the common law of riparian rights is regarded as in force in all jurisdictions as to the United States, itself, at least." (emphasis added)

The position of the United States in the instant case is similar to a lower riparian proprietor's insistence that the full flow of the stream be maintained past his land.

If the common law of riparian rights is applicable to the instant case, then the question arises as to the controlling legal principle. The relationship between surface and underground waters has often been recognized by the courts with the result that riparian principles have influenced the development of Western States underground water law. The strict common law rule of absolute ownership of percolating ground waters laid down in *Acton v. Blundell*, 12 Mees. & W. 324 (Exch. Chamber 1843) has been modified by application of riparian principles in Western States case law. The fundamental proposition of reasonable use of percolating ground water established by the California Supreme Court in *Katz v. Walkinshaw*, 141 Cal. 116, 70 Pac. 663, 74 Pac. 766 (1906), has become known as the American Rule. It depends upon a riparian principle, equality of right, the classical statement of which was made by Justice Story in *Tyler v. Wilkinson*, 4 Mason 397, 24 Fed. Cas. 472, 474 (1927):

> "There may be and there must be, allowed to all, of that which is common a reasonable use . . . There

> may be a diminution in quantity . . . perfectly consistent with the existence of the common right. The diminution . . . not positively and sensibly injurious by diminishing the value of the common right, is an implied element in the right. . . ."

Wiel's analysis of the line of cases beginning with *Katz* indicates that the issue involved in a determination of reasonable use focuses on the nature and extent of the damage to the complaining party, and such damage, if shown, is not wrongful if done in the reasonable use of the land of the party complained of. 2 Wiel, supra, § § 1049-65. Another noted text writer, Clesson S. Kinney, in discussing *Katz*, expressed this view:

> "But before either a preliminary or a final injunction in such cases will be granted, there must be the clearest showing upon the part of the party seeking such relief, that there is imminent danger of irreparable and substantial injury to his rights, and that the diversion complained of is the real cause of such injury, and, further, that he has not been guilty of laches or unreasonable delay in seeking to protect his rights." 3 Kinney, *Irrigation and Water Rights* § 1616 (2d ed. 1912).

When the level of the water in Devil's Hole drops below 3.3 feet below the copper washer, the Cappaerts are enjoined from pumping regardless of the cause of the lowering of the surface. Such a decree is not in accord with the doctrine of reasonable use; it provides for a sharing of only the surplus waters, if any, over and above the needs of the reservation.

The District Court in the instant case foreclosed

judicial consideration of the important issues concerning reasonable use when it ruled that the water rights of the United States are superior in time and right to those of the Cappaerts because the federal reservation of January 1952 had predated any actual beneficial use by the Cappaerts under state law. By allowing the Federal Government to exert an exclusive right based on a priority of use in time, the Court conferred a benefit accorded not even actual appropriators under Nevada's statutory scheme; a scheme with which the Government refuses to comply. The Court thereby excused the Government from the burden of persuasion with respect to the equities involved in reasonable use. Such judicial indulgence enables the Federal Government to pick and choose only the most favorable elements from traditional water law doctrines. Elements from one doctrine are woven together with elements from another doctrine to produce a hybrid system which avoids the burdens of both the riparian and prior appropriation doctrines and which emasculates the salutary principles of Western States water law. The effect is the creation of a monopoly under the guise of reserved rights, which is not only antithetical to reasonable use and prior appropriation, but is in derogation of the Western States' policies of an equitable sharing of their limited water resources.

If this Court should hold that a non-statutory prior appropriation is the law of the instant case and controlling with respect to the reservation doctrine, then the *amici* urge that it be fairly applied consistent with the policies of the common law of prior appropriation as

laid down in the Western States case law. The *amici* are confident that such an application will reveal the improvidence of the injunctive relief under the circumstances of the instant case.

Prior appropriation depends upon an actual appropriation of a quantity of water for a beneficial use such that notice of the fact of appropriation is fairly imputed to the appropriator's neighbors. Whether an appropriation may be effected by nothing more than a presidential proclamation, or for that matter any withdrawal of public lands, is questionable under traditional Western States concepts. Even if it were possible, the government is not immune from the affirmative duties of diligence and efficiency that precondition a senior appropriator's priority call over a junior's water rights. An appropriator cannot demand the full flow of the natural stream to accomplish his purpose, but instead must, when the water is needed by others, substitute efficient means of diversion and application. *E.g.*, *Empire Water and Power Co. v. Cascade Town Co.*, 205 F.123 (8th Cir. 1913). An appropriator cannot even insist upon the maintenance of stream flow at his point of diversion where the above policy requires that he replace the natural flow that formerly came to his headgate with wells in order that junior pumpers from wells can also get their water. *Templeton v. Pecos Artesian Cons. Dist.*, 65 N.M. 59, 332 P.2d 465 (1958). There is no reason why a federal use of water under the reservation doctrine should not have attached to it the same requirement of efficiency. Assuming for the sake of argu-

ment that the United States has the priority in this case, it is not controlling. It was the prior appropriators who were bound to improve their works in *Empire* and *Templeton supra*. See also *In Re Silves River*, 115 Ore. 27, 237 P.322 (1925); *Warner Valley Stock Co. v. Lynch*, 215 Ore. 523, 336 P.2d 884 (1959). The United States may well be able to pipe water into Devil's Hole to maintain the required water level around the shelf by use of an injection well above the Hole. (Injection wells have been used along the California seacoast to prevent salt water encroachment). In such fashion, the pupfish could be protected without impairing or destroying the water rights of irrigators adjacent to the reservation. After all, the preservation of the pupfish is for the benefit of all the people of the United States and the costs necessitated by that preservation are properly allocated to the government, not to the irrigators.

This Court has recognized the fundamental concepts of prior appropriation and the dangers of monopoly when the docrine is misapplied. In *Schodde v. Twin Falls Land and Water Co.*, 224 U.S. 107 (1912) the United States Supreme Court held that one who had lawfully appropriated the amount of water from a stream in Idaho to which he was lawfully entitled for beneficial use could not restrain those below him from raising the river so as to interfere with the power via a water wheel necessary to raise the water appropriated by him to a height necessary for distribution over his land; neither his appropriation nor his riparian rights gave him any control over the current

of the stream. In so holding the Supreme Court cited one of its earlier opinions as follows:

> "In *Basey v. Gallagher*, 20 Wall. 670, 683, the Supreme court of the United States said: 'Water is diverted to propel machinery in flour-mills and saw-mills, and to irrigate land for cultivation, as well as to enable miners to work their mining claims; and in all such cases the right of the first appropriator, exercised within reasonable limits, is respected and enforced. We say within reasonable limits, for this right to water, like the right by prior occupancy to mining ground or agricultural land, is not unrestricted. It must be exercised with reference to the general condition of the country and the necessities of the people, and not so as to deprive a whole neighborhood or community of its use and vest an absolute monopoly in a single individual.' "

The Supreme Court further cited with approval the case of *Fitzpatrick v. Montgomery*, 20 Montana 181, 187 as follows:

> "While any person is permitted to appropriate water for a useful purpose, it must be used with some regard for the rights of the public. The use of water in this state is declared by the constitution to be a public use.... It is easy to see that, if persons by appropriating the waters of the streams of the state became absolute owners of the waters without restriction in the use and disposition thereof, such appropriation and unconditional ownership would result in such a monopoly as to work dis-

> astrous consequences to the people of the state. The tendency and spirit of legislation and adjudication of the northwestern states and territories have been to prevent such a monopoly of the waters of this large section of the country, dependent so largely for prosperity upon an equitable, and, as far as practical, free, use of water by appropriation."

Finally the Supreme Court concluded that the "application here sought to be made of the doctrine of riparian rights would be absolutely destructive of the fundamental conception upon which the theory of appropriation for beneficial use proceeds, since it would allow the owner of a riparian right to appropriate the entire volume of the water of the river without regard to the extent of his beneficial use." The injunction in force in the instant case seems to grant to the United States what the Supreme Court concluded was not in the public interest of the people of another State.

Neither the Property Clause nor the Supremacy Clause of the Constitution warrants an interpretation of the reservation doctrine which excuses the government from the obligations imposed by traditional Western States water policies and doctrines. Such an extension of the doctrine would jeopardize countless private water rights established under state permit systems and be disruptive of future water administration in the Western States. Congress did not intend such a result under the Acts of 1866 and 1870, the Desert Land Act of 1877, or indeed, the Act for the Preservation of American Antiquities. "Congress has followed a consistent

policy of adherence to state law with regard to the acquisition and administration of water rights by the federal government." *In re Green River Drainage Area*, 147 F. Supp. 127, 145 (D. Utah 1956). See also the numerous supporting citations at 145-46.

The citizens of the Western States have a close and profound involvement in the lands in which they live. They have made productive what was largely wilderness, but they could not have done so without water. The legislatures and courts of the Western States often through agonizing and intense efforts have attempted to achieve for their citizens a secure method of maximizing their scarce water resources. Only in this manner could they afford a measure of security of investment which would justify the rigors of a sometimes harsh existence. Continued development of the West depends upon judicious water planning. Future federal water reservation of unlimited magnitudes would seriously undermine, if not eliminate, state water planning in many areas. Only if the claims of the Federal government are reasonably foreseeable under an equitable legal system, is it possible for State water planners to provide adequate water programs for the future that will encourage continued development of western lands; public policy would seem to require at least this.

C. THE UNITED STATES IS BARRED UNDER THE PRINCIPLES OF COLLATERAL ESTOPPEL FROM INITIATING A COURT ACTION TO ADJUDICATE ISSUES DECIDED IN A PRIOR STATE ADMINISTRATIVE PROCEEDING IN WHICH IT PARTICIPATED, BUT FROM WHICH IT FAILED TO APPEAL.

This Court in *United States v. District Court of Eagle County*, 401 U.S. 520 (1971), established that

federally reserved water right claims may be adjudicated within the framework of state statutory schemes. The United States cannot reasonably contend that the state did not have jurisdiction in the prior administrative proceeding by raising the doctrine of sovereign immunity since that doctrine is simply not applicable to the facts of this case. The doctrine provides that the government cannot be sued in its own courts, or in any other, without its consent. Here, the government was not sued, but instead intervened in the proceeding of its own volition to present its case against granting the defendant's application. As this Court stated in an analogous situation:

> "There is no merit to the suggestion that the United States, in presenting its claim in the state proceeding, would be compelled to take the position of a defendant,—being sued without its consent. In intervening for the presentation of its claim, the United States would be an actor—voluntarily asserting what it deemed to be its rights—and not a defendant."

Thus, the Nevada State Engineer in the administrative proceeding was competent to render a decision binding on all parties as to all matters affecting the defendant's application including the question of a conflicting federally reserved right.

Issues that were or could have been adjudicated in an administrative proceeding have been held barred from being litigated in a subsequent court action,

especially where, as here, the determinations are made for a purpose similar to that of a court and in proceedings similar to judicial proceedings. *E.g., Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430 (1943); *United States v. Utah Construction Co.*, 384 U.S. 394 (1966); *United States v. William Tablet Co.*, 141 F.2d 141 (7th Cir. 1944). This principle of collateral estoppel has been held applicable even though the aggrieved party fails to appeal the administrative decision. *Paramount Transport System v. Chauffers, Teamsters and Helpers, Local 150 et al.*, 436 F.2d 1064 (9th Cir. 1971). Such state decisions must be given the same effect in federal courts as is given to them by the courts of the state in which they are rendered. *See* e.g. *Wright v. Georgia R & Bkg. Co.*, 216 U.S. 420 (1909); *Union & Planter's Bank v. Memphis*, 189 U.S. 71 (1903); 47 Am. Jur. 2d Judgments § 1289. For the purpose of the rule of collateral estoppel or *res judicata*, "parties" barred under the rule are not merely those who are named as such in the record and properly served with process, but includes persons who have a direct interest in the subject matter of the action and have a right to control the proceedings, defend, examine witnesses, and appeal if an appeal lies. *E.g., Vane v. Haffberger Co.*, 196 Md. 450, 77 A.2d 152 (1950). This principle is also applicable to the federal government. As this Court stated in *Drummond v. United States*, 324 U.S. 316, 318 (1944):

> "If the United States in fact employs counsel to represent its interests in a litigation or otherwise actively aids in its conduct, it is properly enough deemed to be a party and not a stranger to the litigation and bound by its results. Compare *United States v. Candelaria*, 271 U.S. 432; 16 F.2d 559, with *Logan v. United States*, 58 F.2d 697. But to bind the United States when it is not formally a

party it must have a laboring oar in a controversy."

The above rules have been held applicable to reserved rights claims of the United States. In the case of *In re Green River Adjudication v. United States*, 404 P.2d 251 (Utah 1965), the court held that since the United States had become a party and had asserted its water rights claims in the adjudicatory proceeding, the court had jurisdiction of the subject matter and the parties, and any determination with regard to the water rights of the United States was therefore *res judicata* as to "any water rights which have been or could have been claimed within the adjudication. . . ." *Id.* at 252. This included the claims for additional reserved rights asserted by the government. The court stated that "if the rule were otherwise, the government through its agents, could be wholly arbitrary about asserting water rights, if and when it pleased." *Id.* at 252.

It is submitted that under the above principles the United States should have been barred from asserting in this case reserved rights claims determined in the prior state administrative proceeding. Prior to the administrative hearing, the United States filed written protests on the basis that the pumping of the wells would adversely affect the water in Devil's Hole and thus result in harm to the fish living in the pool. This objection was reiterated in detail at the hearing before the State Engineer. President Truman's proclamation and expert testimony on the hydrology of the Ash Meadow area were introduced by the government. The nature, value and extent of the competing interests of the federal government and adjacent land owners was thoroughly argued during the hearing. As the transcript reveals, the issue of the lowering of the water in Devil's Hole and the effect on the fish therein was thoroughly considered. Although the federal government did not specifically assert an implied reserved water right, the existence of a federal water right was considered, but it was concluded that one did not exist. After the State Engineer rendered his decision granting the applications, all parties were informed that they had thirty days in which to appeal according to Nevada's statutory procedures. These procedures have been held by the Supreme Court of Nevada to be the exclusive remedy for those aggrieved by a decision of the State Engineer, *Jahn v. Sixth Judicial District Court In and For Humboldt County, et al*, 73 P.2d 499 (Nev. 1937), and by a federal court to fully comply with due process requirements, in that they provided any aggrieved party a full opportunity to be heard before a court of competent jurisdiction with right of appeal to the Supreme Court. *Humboldt Lovelock Irrigation Light & Power Co. v. Smith*, 25 F.Supp. 571 (D. Nev. 1930). The United States did not appeal. Approximately six months later the government filed its complaint in this case in the Federal District Court. Allowing the government to thus initiate a judicial action six months subsequent to the administrative determination and after a substantial investment by the individual defendant in reliance upon the administrative decision is to clearly violate the principles of collateral estoppel and to make meaningless

the administrative order of the State Engineer and Nevada's statutory procedures to appeal the order.

From the earliest times, water law has been state law. The states have systems of water law and procedures adapted to water supply, climate, and demand. The United States does not. The initial forum, therefore, to achieve coordination and accommodation of federal uses with state and private uses is properly the state court, or in the case of Nevada, the administrative adjudication procedure which substitutes in the first instance in place of a court, the State Engineer, expert in the area of water use, and from whose order an aggrieved party may appeal to the state courts. The opinion of this Court in the *Eagle County* case, *supra*, supports this position. Furthermore, this Court there set forth the proper method by which the federal government could obtain review of the state determinations as to its reserved rights claims:

> "*All such questions*, including the volume and scope of a particular reserved right, are federal questions, which, *if preserved*, can be reviewed here after *final* judgment by a Colorado Court." (Emphasis added).

The logical meaning of "if preserved" is that the United States must pursue state appeal procedures in order to "preserve" its claims for review in federal court. Further emphasis is placed on state review when the Court referred to "final judgment." The implication is that the United States must pursue protection of its rights in State Courts, and must pursue its remedy to final State Court judgment *before* seeking Federal Court review.

It is submitted that the proper remedy of the United States in this case was to appeal the decision rendered in the administrative proceeding to determine the individual defendant's water right application. Holding otherwise, as did the Ninth Circuit, allows the government to have a second independent review of its reserved rights claims in disregard of prior determinations under state laws and procedures. Such a decision can only exacerbate the uncertainties to which the reservation doctrine already subjects state created water rights in the West.

V. CONCLUSION

The federal government in this case has argued from the beginning that this case will determine the survival of the Desert Hole pupfish, and such thinking may well have caused the lower court to overlook the serious consequences on state water laws and procedures which its decision could have. Justice Jackson in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) warned that powers finding their genesis only in necessity are potentially limitless and cautioned against using a result-oriented approach:

> "The opinions of judges, no less than executives and publicists, often suffer the infirmity of confusing the issue of a power's validity with the cause it is intended to promote . . . The tendency is strong to emphasize transient results upon policies . . . and lose sight of enduring consequences upon the balanced structure of the Republic." *Id.* at 634.

Upholding the government's claims only on the basis of the necessity to preserve the pupfish is not only unwise, but unfounded. This case does not involve the survival of the Devil's Hole pupfish. As pointed out by a leading authority on the preservation doctrine:

> ". . . [T]he reservation doctrine adds nothing to the power of the United States to take and use the water it needs for any constitutional purpose or power. If a constitutionally enacted statute gives an agency of the United States the power to perform a federal function on any federal land in any state, whether public land, reservation or acquired land, and that function requires the use of water, no state's law can block or limit the use of water or acquisition of a water right. No theory of federal ownership or reservation is required. The only difference resulting from reliance on the reservation doctrine instead of on a more basic federal power is that in some cases where the water is taken from persons who have previously put it to use the United States need not pay for the taking. The reservation doctrine is a financial doctrine and nothing more." F. J. Trelease, *Federal-State Relations in Water Law* 147 M (1971).

Thus, if the United States determined that the condemnation of the defendant's water rights was necessary in order to preserve the Devil's Hole pupfish, it would have ample power to do so under the Endangered Species Act, which empowers the Secretary of the Interior in carrying out the program "to

acquire by purchase, donation or otherwise, lands, waters or interests therein . . ." 16 U.S.C. Section 1534. Nevada law could not block or limit that acquisition. No reliance on the reservation doctrine would be required. Instead, the government chose to rely on reserved rights claims in the hope that it could avoid paying compensation for the destruction of the defendant's water right. Such was clearly not the result intended by Congress when it passed legislation specifically designed to protect endangered species. Act of October 15, 1966, P. L. 89-669, 80 Stat. 926, 16 U.S.C. 668 dd(i); Act. of December 5, 1969, P. L. 91-135, 83 Stat. 275; Act of December 28, 1973, P. L. 93-205, 87 Stat. 884, 16 U.S.C. § § 1531-1543. Although twice amended since its original enactment in 1966, the Act has always provided as follows: "Nothing in this Act shall constitute an expressed or implied claim or denial on the part of the federal government as to exemption from State water laws." 16 U.S.C. Section 668 dd(i).

Even if the government were held to have sufficient reserved rights to protect the pupfish, it should not follow that they are entitled to completely preempt all other uses in the underground aquifer which jeopardize the designated water level in the Hole. The United States has no immuity from the same policies which influnced the shape of state laws and state water rights, though in the case of reserved rights it may not be bound by those laws. Water should be efficiently used, and water law, state or federal, should encourage the maximum use of the resource and its use by the greatest

number of people or for the greatest number of uses. Water users appropriating water under state procedures should be protected in their reasonable use of water so that they may be afforded a measure of security in property investment. Only in this manner may development of western lands go forward as in the past in furtherance of the public interest.

If this Court affirms the Ninth Circuit decision, it will mean that it has sanctioned the government's rejection of reasonable alternatives, and allowed the government to in effect monopolize the entire underground aquifer to maintain the designated water level in Devil's Hole with no requirement of efficiency in use, and to avoid any compensation for the resulting impairment or destruction of the water rights of adjacent land owners. It will further mean that the federal government has succeeded in asserting reserved rights on national monument lands for a purpose which was not intended by Congress in the legislation providing for such withdrawals, and indeed, which Congress has declared shall not entail reserved rights claims exempt from state water laws. Furthermore, the reservation doctrine will have been held applicable to percolating groundwaters, a conclusion which is inconsistent with the rationale behind the doctrine, and which could significantly exacerbate the uncertainties generated by the doctrine with respect to state granted water rights in the West. Finally, affirming the Ninth Circuit's decision will mean that the federal government, contrary to the guidelines set down by this Court in the *Eagle County* case, was able to obtain a second independent review of

its reserved rights claims in disregard of the determinations of an earlier state administrative proceeding in which it participated and from which it failed to appeal. In view of these implications with respect to state water laws and procedures, the *amici* urge this Court to reverse the Ninth Circuit's decision in this case.

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